No. 2835

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WILLAMETTE & COLUMBIA RIVER TOWING COMPANY, A CORPORATION

Plaintiff in Error

VS.

ELLA A. HUTCHISON

Defendant in Error

Brief of Defendant in Error

On Writ of Error to the District Court of the United States for the District of Oregon.

Names and Addresses of the Attorneys of Record:

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SCHWAB PRINTING COMPANY

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STATEMENT.

On May 3, 1915, plaintiff in error was operating as a common carrier, a steamboat in the Snake River at Lewiston, Idaho, said boat being known as the "J. N. Teal." Mr. R. Verne Hutchison, a youth twenty-four years of age, as a member of a band, boarded said boat while the same was at the wharf, and passed to the stern of said boat for the purpose of ascending to the upper deck.

For the purpose of using certain permanent stairs, *landing on covering of water-wheel,* generally used as a means of ascent and descent between the two decks, it became necessary for said R. Verne Hutchison to go upon the covering of the water-wheel of said steamer. While attempting to ascend stairs, the covering of the water-wheel broke, letting R. Verne Hutchison fall through said water-wheel into the water of Snake River, and said R. Verne Hutchison was thereby drowned.

Action was brought by the widow mother, as sole heir at law under the statute of the State of Idaho, same being based on Revised Codes of Idaho, Section 4100.

The mother made the following allegations of negligence:

"That defendant was careless, reckless and negligent in the manner following:

(a) That defendant failed to provide a safe landing of stairs from the first to second decks.

(b) That defendant failed to warn decedent not to use said stairs, or not to go upon the covering of said water-wheel.

(c) That by reason of the lack of warning or guards, and the presence of the stairs, with a board leading from the railing of the lower deck to the base of landing of said stairs on said water-wheel, defendant thereby held out an invitation to decedent to go upon the covering of the water-wheel and use said stairs.

(d) That the covering of said water-wheel was not sufficiently strong for the purpose for which said defendant was allowing the same to be used.

(e) That defendant allowed or permitted passengers, and more particularly this decedent, to go upon the covering of said water-wheel.

(f) That no other stairs leading from first to second decks was provided on said boat.

(g) That the covering of said water-wheel had been allowed to deteriorate in strength."

The jury saw the boat, and were aided by pictures. The defense was contributory negligence, in which it was claimed:

That Mr. Hutchison disregarded posted notices, and the verbal warnings of an employe of the boat, named Mohler. That in his attempt to reach the hurricane deck, he stepped off the plank that led from the top of the deck railing of the lower deck, to the base of the stairs. (This plank rested on top of wheel covering. The stairs lead from, and rested on the wheel covering.) That an iron *ladder* could have been used with safety. (This was a fixture of the boat, on the far side from where Mr. Hutchison boarded the boat.) That there was commotion among the passengers and members of the band while they were on the covering of the water-wheel.

Defendant in error called twelve witnesses, who had either used the stairs within the day, or been to the place where the plank led out to the covering of wheel and to the base of the stairs. *These witnesses*

all testified that they saw no notices. A picture introduced by defendant in error to show the stairs and plank, *which was taken a few days after the occurrence,* showed what is probably a tin notice of some kind posted directly above the plank. Witnesses, not noticing the dark spot above the plank in the picture, identified the picture as being a correct reproduction of the physical conditions at the time of the drowning of Mr. Hutchison. Overlooking that the picture was taken a day or two after the occurrence, and that the witnesses' attention was not called to the dark spot, which is probably a notice, counsel contended, that this established the position of the boat company that there was a notice. Four of the twelve witnesses, three of whom were ladies, one of these, sixty-one years of age, had just used the stairs, and were on the upper deck at the time of the drowning of Mr. Hutchison. *Although the boat company called seven witnesses that worked on the boat, but one, Mr. Mohler, testified there were notices.*

Mr. Riggs, master and pilot, was asked by the court (Transcript, page 149): "Then it was usual to allow passengers to go up that way to get on the hurricane deck?" to which the witness replied, "When I seen fit, yes. When I seen fit, and things were roped off proper for passengers, could let as many as I seen fit."

The roping off, as admitted by witness, was on the upper deck, to protect passengers on the upper deck, and had nothing to do with guarding the stairs,

or protecting the passengers on the covering of the water-wheel. By this, the boat company admitted that the practice was to use the stairs in the condition same were then in.

As to Mr. Mohler giving verbal notice not to use the stairs, he testified that he was on the hurricane deck at the head of the stairs, warning passengers not to come to the hurricane deck. The circumstances of his claiming to be on top, rather than at the place where the passengers were coming on the cover of the water-wheel, condemns the story. As the purpose was to prevent injury, certainly any one's intelligence would direct that he be at the place where the passengers were coming on the covering of the water-wheel. Doubtless the object of Mr. Mohler's testifying that he was on the hurricane deck, was to place himself in a position where there would be few passengers to refute his story, as the boat was just loading, and only a limited number of passengers had reached the upper or hurricane deck.

About four witnesses had just used the stairs, some three or four of passengers were going up, and others on the water-wheel could see on top of the hurricane deck. None of these passengers saw Mr. Mohler. The reason for Mr. Hutchison's stepping off the plank, was that other passengers were coming on behind him, and several were on the stairs going to the hurricane deck. (The only other means of reaching the hurricane deck was by an *iron*

ladder, which led from the *far side of the boat from that on which the passengers were boarding.*)

The persons with Mr. Hutchison had seen the members of another band than that of which Mr. Hutchison was a member, come down the stairs over the water-wheel when the boat came in from a previous trip from which the boat had just returned. It is in evidence that his band was told to go to the upper deck.

As to the commotion, our witnesses testified there was none. Some of defendant's witnesses testified there was commotion *coming on the boat.* The defendant attempted to make something of the fact that a young man by the name of Bostock testified he jumped on the covering of the water-wheel (page 109 of Transcript). *This young man was on a previous trip of the boat, and was not with the party of which Mr. Hutchison was a member. Neither was he an acquaintance of Mr. Hutchison or a member of his band.* An attempt is made in opponent's brief (at page 21), to have it appear by implication that this young man was of the party. To the contrary, see Transcript, page 106. At the bottom of page 2 of Plaintiff's Brief, the statement is made that decedent walked out on the wheel-house. Again at page 21, the statement appears that decedent walked away from stairs "some six or eight feet." *At page 66, Transcript, witness states Mr. Hutchison stood beside him, and he stood but four feet from the base of stairs.* (This is only testimony on the subject.)

At page 4 of brief, plaintiff recites Mr. Tuttle's testimony in which he states, possibly he could have stepped directly from plank to stairs. Mr. Tuttle as well as all the other witnesses testified that the reason they did not ascend the stairs was due to the presence of other passengers on the stairs, some of whom were ladies. They also stepped aside to allow ladies to ascend who were behind. (See Transcript, pp. 49, 61, 70, 79.)

POINTS AND AUTHORITIES.

The writ should be dismissed, as the petition was filed, and the writ issued, May 18, 1916, while the assignment of errors was not filed or served until June 3, 1916.

Rule 11, U. S. Appellate Court.
Fosters Fed. Practice, Vol. 3, p. 2469.
Frame v. Portland Coal Co., 108 Fed. 750.
Weber v. Nihills, 124 Fed. 64.
Simpson v. First National Bank, 129 Fed. 257.
Copper River Co. v. McClellan, 138 Fed. 333.
Coyote G. & S. M. Co. v. Ruble, 9 Ore. 121.

Sec. 4099 of Statutes of Idaho, reads as follows:

"A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, and a guardian for the injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury, or death, or if such person

be employed by another person, who is responsible for his conduct, also against such other person."

Sec. 4100 of Statutes of Idaho, is as follows:

"When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person, who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case, may be just."

Every exception taken is too general to entitle plaintiff in error to review.

Rule 40, District Court of the United States, District of Oregon.

ASSIGNMENT No. 1.

The evidence excepted to was admissible for four reasons:

(1) To show the custom of the boat company in allowing the stairs to be used, and allowing passengers on the upper deck, both alleged facts of which were in issue.

(2) The boat company contended that there were notices warning passengers not to use the stairs, and not to go to the hurricane deck. Assuming that there were notices, this evidence would be

admissible to show the disregard of the same by the boat company.

(3) To show that the boat company must have had notice that passengers were using the stairs in question, and riding on the hurricane deck.

(4) The evidence would be admissible for the purpose of informing the jury whether or not Mr. Hutchison could be considered guilty of contributory negligence in using the stairs.

29 Cyc. 607, 612, 639.

Ill. Central Railroad v. Davidson, 76 Fed. 517-520.

Chicago G. W. R. Co. v. Egan, 159 Fed. 40.

Crawford v. Stock Yard Co., 215 Mo. 394.

Galvin v. Brown & McCabe, 53 Ore. 598-614.

ASSIGNMENT No. 2.

The evidence complained of was admissible to establish the intimacy between mother and son, as of the measure of damage under the *Idaho Statute.*

Sec. 4100, Idaho Statute.

Anderson v. Great Northern R. R. (Idaho), 99 Pac. 91-92.

Shearman & Redfield on Negligence, (6th Ed.), Sec. 767.

ASSIGNMENT No. 3.

The question of contributory negligence cannot be reviewed, as the evidence is not before the court.

Same is not certified, or in any way authenticated by reporter taking same.

ASSIGNMENT No. 4.

An instruction should not assume the existence of a material fact in dispute.

38 Cyc. 1657.

ASSIGNMENT No. 5.

Public carriers must keep entire premises safe.

3 Thompson's Com. on Negligence, Sec. 3060.

ASSIGNMENT No. 6.

The court gave the instruction asked for.

Pages 175-176, Transcript.

Anderson v. G. N. Co., 99 Pac. 91.

ASSIGNMENT No. 7.

The error complained of, if it be error, was fully cured by other instructions.

ARGUMENT.

The writ should be dismissed in this case, as the petition was filed, and writ issued May 18, 1916, while the assignment of errors was not filed or served until June 3, 1916. The authorities that we have cited under "Points and Authorities," are decisive of our right to have the writ dismissed.

The only authorities cited *by opposing counsel* that are in cases where it was contended no assign-

ments were filed with petition, are the following:

Tyee Consolidated Mining Co. v. Langstedt, 121 Fed. 709-711.

More v. More, 121 Fed. 737.

Pittsburg C. C. & St. L. Ry. v. Glinn, 219 Fed. 150.

The first case cited by plaintiff, is a case in which the court found *the circumstances indicated the assignments of error had been filed with the petition,* although the assignments had a filing mark of a subsequent date. In the second case, *the assignments had not been filed, the instrument was found in the files, and the petition recited the presentation of assignments with the petition.* The court held that it would be presumed the assignments were filed with the petition.

Both of these cases are authorities to sustain our motion. Had the record shown the assignment of errors filed subsequent to petition, decisions clearly indicate the holding would have been to the contrary, and the writ dismissed. In the third case, the question that appears to have been before the court was whether or not the assignments of error were filed in time, where the same had been filed after the *bill of exceptions,* and Rule 10 of the *Sixth Circuit Court of Appeals was under consideration.* We are unable to examine Rule 10 of the court which had this matter under consideration. It would appear that Rule 10 of that court might not be the same as Rule 11 of this court.

No reference is made in this decision to the terms of a rule, such as Rule 11, which provides that the assignments shall be filed with the petition, *and that otherwise, the petition shall not be allowed.* All the other cases cited by plaintiff have to do with the question of noticing additional, faulty or unassigned errors *rather* than the question of a writ being allowed where *no* assignments of error are filed with the petition.

Rule 11 of this court says: *"No writ of error or appeal shall be allowed until such assignments of error shall have been filed."*

This fully disposes of the question of allowing writs of error. Following this language, as found in the rule, are instructions as to how the assignments are to be made. Then follows the language: "When this is not done, counsel shall not be heard, except at the request of the court, and errors not assigned according to this rule, will be disregarded, but the court, at its option, may notice a plain error not assigned."

Certainly this language as last used, does not mean to render nugatory the provision that *"no writ shall issue until assignments are filed."*

It means what the numberless decisions last cited by opposing counsel hold, that plain error not assigned may be noticed. In short, the court is without authority to issue writ unless *some assignments have been filed with petition.*

Hence, the court must dismiss, rather than make an examination. This court cannot find plain error

without an examination of the record. When an error is found, it becomes *plain error.* If plaintiff is entitled to an examination of record on a writ that should not issue, then why file assignments at all? The purpose of this rule is so plain as to leave no doubt as to its meaning. There must be some assignments of error before the court can say plaintiff is entitled to the writ. Otherwise, a writ could and would issue in a case where no objections were made, or exceptions taken, and there was nothing on which to predicate alleged error. What a meaningless proceeding suing out a writ is, if there is no alleged error on which to base the writ? When an assignment has been made, and the court is engaged in examining the alleged error, then it is but reasonable that error not properly assigned, as provided in Rule 11, but properly preserved in the trial, might be noticed.

It is claimed that plaintiff is within the rule, under the first two decisions, as it is recited in the assignment that assignments "are in connection with its petition." This in no way aids plaintiff in error, as nothing can be assumed from this to establish by implication that the assignments were filed with the petition, or to impair the verity of the filing endorsements. Plaintiff cannot contend, nor does it pretend to say, that there is any mistake in dates of filing. The admissions of service are of dates of filing.

We have cited *Coyote G. & S. M. Co. v. Ruble,* 9 Ore. 121, to the effect that the court is bound equally with the litigating parties as to rules of the court;

that where no discretion is reserved by the court under the rule, the rule is binding on the court. This case is a leading case on this question, and has been followed in a long line of decisions by the Supreme Court of the State of Oregon, and by other Supreme Courts. If the court should refuse to dismiss writ, then we submit the court must only look for *plain error.*

In our opinion, there is no rule of practice that serves a more laudable purpose, and should be more rigidly enforced, than the rule requiring objections and exceptions to be specific. Otherwise, an undue advantage is taken of the prevailing party. Many times courts are inclined to overlook this rule, to the great disadvantage and injury of the prevailing party.

In the record of this case, the second exception is the only one that informs the trial court, or defendant in error, of the alleged error. All other assignments are made known for the first time in our opponent's brief. So far as serving the purpose that objections and exceptions are expected to serve, plaintiff in error may as well have taken one exception to the whole proceeding.

The admission or exclusion of evidence is not measured by its competency, but by its incompetency. It is necessary that the grounds of alleged incompetency be specific to preserve the right of a review.

In saving exceptions to instructions refused, to

serve the purpose for which the rule exists, that particular error complained of, must be brought specifically to the attention of the court. We submit that our opponent now seeks to have this case tried *de novo.*

In discussing the several assignments of error, we will not again make reference to the insufficiency of opponent's objections and exceptions. In considering any assignments, we respectfully invite the court's attention to the insufficiency of the objections and exceptions.

ASSIGNMENT No. 1.

This assignment is based on the objection to the testimony of Dell Wilson, who testified that he, together with his wife and child, used the stairs on the previous trip of the boat, made the same day as the trip about to be started when Mr. Hutchison was drowned. He further testified that he at this time saw passengers on the hurricane deck. *This evidence was not introduced to show other acts of negligence, nor was it claimed to serve this purpose.*

Under "Points and Authorities" we have shown that this evidence was admissible for four reasons. No request was made by opponent to limit the effect of the testimony. If opponent thought that this evidence might be taken by the jury as establishing other acts of negligence, it was its duty to ask that this testimony be limited to the purpose for which it was competent. All through opponent's brief, it is insisted passengers were not allowed, or expected to use the stairs; that notices and a

guard forbade the use; that another way of going to the hurricane deck was the way Mr. Hutchison should have gone. On this occasion the boat was just receiving the passengers. By what other character of evidence could the custom and practice of allowing passengers to use the stairs in question be established, or the charge be established, that if notices were posted, that the same were being disregarded; that the boat company must have had notice of the fact that the stairs were being used by the passengers; that Mr. Hutchison was justified in the use of the stairs.

ASSIGNMENT No. 2.

The evidence complained of, was admissible to establish the intimacy between mother and son, as of the measure of damages under the Idaho statute. Counsel appears to concede that society, comfort and companionship are elements of damage under the Idaho statute, but complains that the pecuniary value must control the amount to be given. The objection can in no way affect our right to show the intimacy. In the instruction requested by the boat company, which it claims was refused, and that the refusal was error, it states that *friendship and affection* are to be taken into consideration in compensating the plaintiff for the pecuniary *or money loss.*

At page 176 of the Transcript of Record, the court will find that the trial court made use of the words *"money value"* twice, in giving the instruction as to the measure of damage. In one of the cases

cited by opponents, namely, *Hillebrand v. Standard Biscuit Co.,* 139 Cal. 233, the court uses the following language:

> "The pecuniary loss, in such cases, means the *value in money,* if any, of the life of the deceased."

Hence, the value in money is the pecuniary loss. The words "pecuniary" and "value in money" are synonymous. In any event, an examination of the requested instruction, will indicate that the boat company was asking for an instruction for pecuniary loss, or *money loss.* The instruction asked for was given. It would indeed be a strange anomaly that error could be committed in the admission of evidence, when the party charging error claims error was committed on alleged refusal of an instruction setting forth the subject as an element of the damage. Much of the argument under this assignment is applicable to assignment 6, in which it is charged that a proper instruction as to the measure of damage was refused. The argument made here will not be reiterated in the argument of assignment No. 6. We invite the application of the argument under this assignment to be taken into consideration in considering assignment No. 6.

ASSIGNMENT No. 3.

The question of directed verdict cannot be reviewed. The purported evidence, as found in the transcript, is in no way authenticated. There is no certificate of the reporter. Nothing is found in the

transcript to indicate where the same came from. However, waiving this, the best argument that there is evidence of negligence, and none of contributory negligence, is the verdict of twelve jurymen. In the argument of this assignment, opposing counsel seeks to have it implied that a member of the party jumped on the covering. The young man whose deposition stated that he had jumped on the covering, was on a previous trip of the boat, was not a member of the band of which Mr. Hutchison was a member, was not with the party at the time of Mr. Hutchison's drowning, nor was he even an acquaintance of Mr. Hutchison.

We are not going to take space or time to discuss the evidence. We have made quite a complete statement of the case, and indicate in the statement what the evidence shows. If the court has not read the statement, we respectfully ask that the court read the statement in connection with this assignment, as the statement of opposing counsel is misleading in several particulars.

The statement has been made by opposing counsel, that the *stairs* expected to be used were at the *front part* of the boat. There is no justification for such a statement, as there are no stairs at any place on the boat leading to the hurricane deck, other than the stairs attempted to be used by Mr. Hutchison. The only other means of reaching the hurricane deck is by an iron ladder, which is on the far side of the boat from the side boarded by Mr. Hutchison and his party. This iron ladder cannot be seen from the

side of the boat boarded by Mr. Hutchison. The evidence all went to indicate that no member of the party knew of the iron ladder. They had seen another band descend by the stairs leading onto the covering of the water-wheel. As there were several passengers both ahead and behind Mr. Hutchison, several of whom were ladies, Mr. Hutchison stepped aside a short distance from the base of the stairs, when he broke through the covering of the water-wheel.

Opposing counsel has attempted to have it appear that Mr. Hutchison could have remained on the plank, turned abruptly at right angles, and ascended the stairs, thus avoiding any necessity of his stepping on the covering of the water-wheel. The jury saw the boat, and observed the physical condition. Evidently the jury believed that Mr. Hutchison was not guilty of contributory negligence in not doing as opposing counsel would now have had him do.

Assignment No. 4.

The instruction asked for, excludes from the consideration of the jury, a question of fact in issue, namely, whether or not the defendant was allowing the passengers to use the covering of the water-wheel in reaching the hurricane deck. The requested instruction would determine the liability of the boat company by what the constructor of the boat may have *intended* the covering to be used for. The court has no right to assume, as is assumed in this instruction, that it would not be necessary, convenient,

practicable or probable that the covering of the water-wheel would be used in connection with the stairs, nor has the court the right to exclude from the consideration of the jury, the fact that the water-wheel covering was not guarded, or made sufficiently strong, and kept so, to serve the purpose for which the boat company was allowing same to be used, when the circumstances might indicate a reason to anticipate the use to which the covering of the water-wheel was or might be placed.

ASSIGNMENT No. 5.

Under this assignment, we have cited authorities to the effect that public carriers must keep their entire premises safe. We feel that this is a rule so well established, and so applicable to the assignment, that no argument is necessary.

ASSIGNMENT No. 6.

In this requested instruction, defendant has made request for an instruction defining the measure of damages, which is in keeping with the evidence introduced by the plaintiff, on which plaintiff in error based assignment No. 2. Here is an alleged error, based on a requested instruction claimed to be refused, when it will be found at page 175 and 176, Transcript of Record, that the requested instruction was covered almost word for word.

Granting for the purpose of argument, that there may be a distinction, we desire to call the court's attention to the fact that there is no exception made to the instruction as given.

We are not going to be drawn into a lengthy argument as to the measure of damages. The case of *Anderson v. Great Northern Ry. Co.,* (Idaho), 99 Pac. 91, sustains a very much broader rule as to the measure of damages, than was given by the trial court in the case at bar.

We are not concerned with what the rule may be in other jurisdictions. We submit that the instruction given by the trial court is more favorable to the boat company, than the instruction sustained by the Supreme Court of Idaho. As we understand the rule, the federal courts are expected to follow the law of the state where the tort was committed.

In opponent's brief, it is contended that the Anderson case is a recovery for a minor; that the same rule would not apply to a recovery of a beneficiary for the death of an adult. Section 4099, Revised Statutes of Idaho, provides who may bring the action in behalf of the minor, and Sec. 4100, who may bring the action in behalf of the adult, *then providing that in either case, such damages shall be awarded as to the jury may appear to be just under all of the circumstances.* (See Points and Authorities.) We are unable to understand how there can be any distinction in so far as the loss of comfort, companionship, and society are concerned, as between minors and adults.

ASSIGNMENT No. 7.

Perhaps no other assignment so exemplifies the charge that we have made, that the exceptions were

not specific, than this assignment. We feel confident the trial court had no idea on what this exception was being based. We know that we had no idea until we received opponent's brief. It now appears that it is claimed that the language used by the court in giving this instruction, allowed another ground of recovery than that alleged in our complaint.

At page 166, Transcript of Record, the court will find that the complaint was read to the jury, and they were instructed that the recovery must be had on the charges of negligence contained in the complaint. This would cure any error, if there were error in the instruction complained of. However, there was no error in the instruction complained of.

Very adroitly, opposing counsel has stated some of the allegations of plaintiff's complaint, but has omitted certain charges which make the instruction entirely proper. Opposing counsel, in stating the charges of negligence, has failed to indicate that there were charges of negligence covering the following:

That there was a failure to provide a safe landing of stairs from first to second decks. That by reason of the lack of warnings or guards, and the presence of stairs, with a board leading from railing of the lower deck to base of landing of stairs on said wheel-house, there was an invitation to decedent to go upon the covering of the water-wheel, and use said stairs. That defendant allowed or per-

mitted passengers, and more particularly this decedent, to go upon the covering of said water-wheel.

These allegations, in addition to the allegations set out by opposing counsel, clearly inform the boat company that we allege there were not sufficient guards or warnings. Whether the guarding be done by properly officering the boat, roping the place, or by other means, or the warning be given by officers, is quite immaterial in so far as the charge of negligence is concerned. The reference that the court has made to guards could not have been misunderstood by the jury. The guards referred to employes being provided that would give proper warnings and instruction to the passengers, or by roping the place to protect the passengers.

Generally speaking, any employe entrusted with this duty, would be an officer of the boat, and in speaking of the boat not being properly officered, the court was conveying to the jurors, the obligation of the boat to see that warnings and instructions were given where the jury might consider warnings necessary or proper.

The allegation that a safe landing for stairs was not provided, is sufficient to charge boat company with every character of omission or commission. Particularly is this true after verdict.

If any of the instructions are correct, then the court must sustain the whole under the objection, exception and assignment.

In charging no evidence was introduced to cover these charges, it must be counsel refers to expert

testimony or conclusions, as the evidence is before the jury of the conditions surrounding the place, and of the happening. This was not a proper matter for expert testimony. What would be necessary to make the place safe are matters of common knowledge. When the circumstances are before the jury, under the allegations, it must be for them to say whether guarding and warning was necessary, and if so, how, where and when it should have been done.

We respectfully submit the judgment should be affirmed.

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